

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

HYANG LEE,

Defendant and Appellant.

G040443

(Super. Ct. No. 07CF0730)

O P I N I O N

Appeal from a judgment and order of the Superior Court of Orange County,  
Richard W. Stanford, Jr., Judge. Judgment affirmed; order remanded with instructions.

Michael B. McPartland, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Gary W. Schons, Assistant Attorney General, Raquel M. Gonzalez and  
Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

\* \* \*

THE COURT:<sup>\*</sup>

Early one morning, Hyang Lee, who was suffering from a mental disorder, doused her husband and three children with lighter fluid and attempted to set them on fire. In accordance with the plea bargain, the trial court sentenced Lee to seven years in prison after she pled guilty to four counts of second degree attempted murder (Pen. Code, §§ 187 & 664) and one count of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)).

The only question on appeal is whether the trial court properly issued a postsentence criminal protective order. The protective order was issued pursuant to Penal Code section 273.5, subdivision (i). It prevents Lee from contacting her children and former husband for seven years. It also allows the children to initiate contact with their mother once, and it permits Lee to ask the trial court in one year's time to change the terms of the order.

The trial court lacks the authority to issue a criminal protective order if the order is not authorized by the statute under which it is issued. (*People v. Selga* (2008) 162 Cal.App.4th 113, 118.) The criminal protective order here was issued pursuant to Penal Code section 273.5, subdivision (i) which provides, in relevant part, that "Upon conviction under subdivision (a) [of Penal Code section 273.5], the sentencing court shall also consider issuing an order restraining the defendant from any contact with the victim." Lee was not convicted under Penal Code section 273.5, subdivision (a). Thus, the protective order is not authorized by the statute under which it was issued and must be stricken as explained below.

The Attorney General concedes the point. But relying on *Wheeler v. United States* (9th Cir. 1981) 640 F.2d 1116 and *U. S. v. Morris* (7th Cir. 2001) 259 F.3d 894, he asks us to affirm the order anyway as a permissible exercise of the trial court's

---

<sup>\*</sup> Before Sills, P. J., Moore, J., and Fybel, J.

inherent power “to issue orders that ensure the safety and privacy of those involved in judicial proceedings.” He makes the request because Lee’s crimes reflect “domestic violence of the most horrible form imaginable.” In the alternative, he asks us “to reform the order to a protective order for five years, under Family Code section 6340.” We decline to shapeshift this order in the first instance on appellate review.

In *Wheeler*, the district court judge issued a no-contact order to protect ten witnesses from a convicted defendant who was continuing to contact them. Although the Ninth Circuit upheld the district court’s broad powers to issue orders to protect witnesses and the administration of justice, it vacated the order, holding in part that there was no evidence the defendant’s communication posed a “clear and present danger” to the witnesses and that less restrictive alternatives were unavailable. (*Wheeler v. United States, supra*, 640 F.2d at pp. 1124-1125.) In *Morris*, the Seventh Circuit upheld a no-contact order “because Morris is endeavoring to withdraw his guilty plea, a future trial is possible and the victim would be a most important witness for the prosecution. Morris has perpetuated his harmful influence in the victim’s life by persistently contacting her indirectly by relaying messages through his friends, and directly by telephone and a letter. The purpose of all Morris’s communications has been to prolong his presence in the victim’s life and to insistently communicate his desire to have an intimate relationship with her in the future, the very type of contact for which he was incarcerated.” (*U. S. v. Morris, supra*, 259 F.3d at p. 901.)

Whether circumstances exist here such that a criminal protective order should issue under the court’s inherent power to protect witnesses and preserve the integrity of the judicial process is a matter for the trial court to determine first. The former husband does not want Lee to have any contact whatsoever with her children. The therapist appointed for the children by the family law court testified at the hearing on the protective order, however, that the children were “very, very embarrassed of the whole situation. They have a lot of shame. That’s the biggest thing. They’re fearful of

her mental status. They're afraid if they were to see her in an orange suit. So they're very, very ambivalent. But I believe clinically it would be good for them to see her again. They love her very much and they miss her." The trial court was fully cognizant that issues of custody and visitation would be determined in the family law court, and said it would "partially defer to the family law court and let them determine within certain limits" what is in the best interest of the children. The court explained that it was imposing a criminal protective order because it was "fulfilling the obligation of the court in the criminal matter to assure that she not have any chance to harm them in the future." The protective order is not authorized by the statute under which it was issued, but the safety of the family may be at stake. Therefore, the order should be remanded to afford the trial court an opportunity to determine under the appropriate standards whether a criminal protective order should issue and in what form.

The judgment of conviction is affirmed. The trial court is directed to strike the existing criminal protective order because it is based on a statute under which defendant was not convicted. The matter is remanded, however, to the trial court for further consideration of whether or not a criminal protective order should issue. (See *Wheeler v. United States, supra*, 640 F.2d at p. 1125 ["we are unable to determine if the trial court issued the order in compliance with the test set out in *Sherman*, in which case it did not exceed its inherent power. If necessary, the district court will make this determination on remand."].)